SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1013

ORIENT MID-EAST LINES, INC, and ASTRONATO CIA NAV. S.A.,

Petitioners,

against

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BAO HIEM VIETNAM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

Where the evidence at trial established: that the SS ORIENT TRANSPORTER lacked customary safety equip-

ment necessary to determine the water level in the boilers and to prevent explosions; that the engine room crew was undermanned; and that an inexperienced and incompetent young boy was unable to perform his duties as a fireman leading to a destruction of the propulsion equipment of the vessel, should this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals to review its decision that the owner had failed to use due diligence to make the vessel seaworthy and that the unseaworthy conditions caused the loss? The petition also asserts that the Court of Appeals erred in finding that there were concurrent causes of the loss in this case and further erred in holding that the vessel was unseaworthy at the commencement of the voyage.

Essentially, petitioners claim that they should be exonerated from liability by reason of negligence in management of the vessel pursuant to the provisions of the United States Carriage of Goods by Sea Act, Title 46, U.S. Code §§1304 (1) and (2)(a). It is respondents' position that petitioners failed to establish a right to exoneration under that statute and that the District and Circuit Courts were correct in holding (1) that petitioners, the vessel owners, failed to use due diligence in making the vessel seaworthy prior to the commencement of the voyage and (2) that the unseaworthy conditions led directly to the loss in this case.

Counter Statement of the Case

The SS ORIENT TRANSPORTER was chartered by the Commodity Credit Corporation on behalf of the Government of Vietnam to carry rice from ports located on the Gulf of Mexico to Saigon. The vessel, laden with respondents'

cargo of rice, sailed from Beaumont, Texas destined for Vietnam on June 14, 1970. When it left the dock in Beaumont, the ship's engine room crew was shorthanded because at least one fireman, two oilers and a wiper had jumped ship. The absence of these crew members had been reported to the police. The wiper, Fetaxides, and an oiler were returned by the police after the ship left Beaumont but before the ship cleared American waters. Due to the shortage of a fireman, upon his return from his absence without leave, Fetaxides found that he had been promoted in absentia from wiper to fireman. A wiper performs janitorial functions in connection with the engine room but a fireman has a more responsible position. He must know at all times the water level in the boilers. Too little water can result in an explosion. Too much water can damage the propulsion system. The fireman regulates the water level by opening and closing feed lines. The water level in a boiler is indicated by a vertical glass gauge located alongside the boiler. A competent fireman who does not see a water level indicated on the gauge should be able to determine whether there is too much or too little water in the boiler by "blowing down" the gauge. This requires draining it by opening a valve and watching as the water refills the glass. If the glass tube fills up to the top the water level is too high. If water fails to appear at the bottom of the glass or just barely appears, additional water is needed.

On June 21, 1970, one week after leaving Beaumont en route to Saigon, Fetaxides, who was on duty as the fireman in the engine room, reported to the engineering officer in charge of the watch, Second Engineer Spetsiotis,

that he had lost track of the water level in the gauge and could not determine the amount of water in the boilers. Spetsiotis had been working on a lube pump in a remote section of the engine room from which position he could not observe the boiler gauge. He went immediately with Fetaxides and attempted to determine the water level by blowing down the gauge. Spetsiotis, however, was unable to determine immediately whether he had too much or too little water in the boilers. Fearful of an explosion if there were too little water, he inserted cold water directly into the system without passing it through the heater normally used to pre-heat the water before it goes into the boiler. Since in fact there was too much water in the system, the cold water added by Spetsiotis overflowed into machinery that was extremely hot. The result was thermal shock and fundamental damage to the propulsion system of the vessel. Because of the vibration and loud noise coming from the machinery, Spetsiotis turned off the power and the ship drifted until ultimately rescued by a tug summoned by the owners.

There were no remote control indicators or warning devices installed on the SS ORIENT TRANSPORTER to indicate water levels in the boilers although they are in common use on other vessels.

There were fully qualified firemen available for hiring in the Beaumont vicinity prior to the sailing of the vessel but no attempt was made to hire one to replace the fireman who had deserted.

Fetaxides did not testify at the trial nor by deposition since he was killed in a subsequent explosion at sea. The

second engineer, Spetsiotis, testified by deposition. Consequently Spetsiotis' description of the events in the engine room immediately prior to the casualty is the only one available. He testified that Fetaxides had opened an extra feed line without advising him and had forgotten about it. Consequently, when Spetsiotis was unable to obtain a reading on the water gauge he assumed, being unaware that the feed line had been opened, that the water level was low and that an explosion might be imminent. He further testified as follows:

> "Q. Did you ask the fireman why he opened the extra feed line? A. Yes. I asked him, and I asked him why, and why, and asked him why he did not report it to me. And I almost kick him.
>
> Q. What did the fireman say? A. He didn't reply at all.
>
> Q. He made no explanation as to why he opened the extra feed line? A. He was young, an unexperienced boy, and apparently he opened and he forgot. He opened and he forgot about it.
>
> Q. How old was this man? How old was the fireman? A. I am not exactly—I do not exactly recall, but he should be between seventeen or eighteen years old."

Respondents presented expert testimony to the effect that a ship with no more equipment than existed on the ORIENT TRANSPORTER to determine the water level was dangerous and that putting an untrained man in a situation where he would work with deficient equipment added to the danger. Finally, a qualified chief engineer with many years experience testified that a fireman who did not advise the engineering officer when he opened the feed valve and who could not determine the water level on the gauge was clearly incompetent.

The petitioners brought suit in admiralty for general average under which the preponderance of all loss sustained would be borne by the cargo interests, the respondents.

The District Court, after a trial, concluded that on June 21, 1970 the ORIENT TRANSPORTER was unseaworthy because it was not properly manned and equipped, these conditions caused the loss complained of, and that the owners had failed to use due diligence to make the ship seaworthy prior to its departure from Beaumont. The Circuit Court affirmed.

Reasons Why the Petition Should Be Denied

1. The Decisions Below Resulted from the Particular Facts Proved at the Trial.

Petitioners do not press it here but there was an additional claim for general average based on damages sustained by the ORIENT TRANSPORTER a few days before she sailed from Beaumont. This other claim, on which they also lost as discussed in the decisions below, gives some general indications of the poor quality of the ship, its crew and its officers.

With respect to the present claim, the facts show that four crew members assigned to the engine room jumped ship prior to sailing, two of whom, including the wiper, Fetaxides, a 17 or 18 year old boy, were returned by police before the ship cleared American waters. The engine room equipment was antiquated, inadequate and unsafe. The crew was short handed and at the critical moment, Fetaxides, the wiper hastily promoted to fireman, proved totally incompetent to perform his new but critical duties.

When he opened a water feed line and forgot about it he put the ship in peril. The second engineer, under emergency conditions, chose to risk thermal shock by an overflow of cold water rather than destruction of the ship and its crew by a boiler explosion.

On this record the courts below properly concluded (1) that the owners had failed to use due diligence to make the vessel seaworthy, (2) that the vessel was not properly manned or equipped, and (3) that these deficiencies caused the loss. These findings can lead only to a decision for respondents' consistent with the provisions of 46 U.S.C. §1304(1) which provides that "the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

2. There Is No Conflict Among the Circuits on the Key Issue: the Petitioners Failed to Use Due Diligence to Make the *Orient Transporter* Seaworthy.

Upon the trial respondents did not rest on the statutory allocation of the burden of proof but rather they assumed the burden of proving (1) the ORIENT TRANSPORTER was unseaworthy because it was improperly manned and equipped, (2) the unseaworthy condition resulted in the loss, and (3) the owners failed to use due diligence to make the vessel seaworthy. Petitioners showed affirmatively that Fetaxides, the youthful wiper promoted to fireman, was incompetent. The ship's log extracts showed the ship was undermanned in the engine room crew. Expert witnesses testified that safety devices were available and in common use which could have prevented the casualty but were not

installed on the ORIENT TRANSPORTER. And finally respondents proved that qualified firemen were available in the Beaumont area to replace the deserter but the owners made no attempt to hire a replacement.

Petitioners based virtually their entire defense on their contention that the negligence of Spetsiotis, the Second Engineer, was the sole cause of the loss and consequently they should be exonerated from all liability under the provisions of 46 U.S.C. §1304(2)(a) which provides: "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship * * *"

The courts below concluded on the facts proved at trial that petitioners' theory was wrong—the incompetence of Fetaxides as well as the lack of readily available safety devices were the basic causes of the disaster.

Petitioners assert that there is a conflict among the circuit courts which needs to be resolved. They ask whether the carrier "must go further after proving that the loss was caused by an error in management on the part of one of the crew members and prove that the loss could not have been caused by the unseaworthiness of the vessel." (Petition p. 6). This assumes a key point was established when in fact it was not. Petitioners failed to prove that the loss was caused by the negligence of Spetsiotis. Respondents affirmatively showed the vessel was unseaworthy because of the lack of a full crew, the incompetence of Fetaxides and the lack of appropriate safety devices and that these

factors led to the loss. The Circuit Court considered petitioners' contentions below and concluded: "At best the appellants showed that Spetsiotis' action, and perhaps negligence, was a concurrent cause of the catastrophe." (A 35).

Petitioners claim to see a difference among the Fifth, Second and Ninth Circuits on the question of burden of proof under these circumstances and ask this Court to compare *Horn* v. *Cia de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir., 1968), *cert. denied*, 394 U.S. 943 (1969), cited as authority by the court below, with *Firestone Synthetic Fibers Co.* v. *M/S Black Heron*, 324 F.2d 835 (2d Cir. 1963); *Director General of India Supply Mission* v. *S/S Maru*, 459 F.2d 1370 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); and *Wilbur-Ellis Co.* v. *M.V. Captayannis S.*, 306 F. Supp. 866 (D.Ore. 1969), *aff'd*, 451 F.2d 973 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972).

There is no conflict. Each Circuit agrees that if the Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(a), is applicable, as it is here, a carrier can be exonerated from liability upon proof that the loss was caused by an error in management of the vessel even though the ship may have been unseaworthy. This is exactly the point where petitioners failed. The courts below concluded that the cause of the loss was not mismanagement or negligence but rather the unseaworthy conditions proven by respondents. This makes all the difference.

In essence petitioners simply would like to have one more review of the evidence but there are no legal issues presented which warrant a review by this Court. The Fifth Circuit reviewed the evidence and affirmed the decision of the trial court. Upon petitioners' petition for a rehear-

ing, the Circuit Court again reviewed the evidence and adhered to its prior decision. Petitioners' final efforts here should be rejected. Their case meets none of the customary criteria for the grant of a writ of certiorari.

Conclusion

The Petition for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals should be denied.

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